BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access	)	MB Docket No. 07-198
Rules and Examination of Programming Tying	)	
Arrangements	)	

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Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] Comcast respectfully suggests that, in deciding whether an expansion of the program access rules is warranted, the Commission should adhere to two core principles. First, *increased competition should be accompanied by decreased regulation*. Given intense competition in the creation, aggregation, and distribution of programming, no expansion of the program access rules is justified. Second, *regulatory action must be supported by statutory authority and evidence in the record*. Although certain parties claim that new rules and procedures for program access complaints should be adopted, there is no legal or factual justification for doing so. The Commission has no basis for interfering further in an intensely

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1 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791 (2007) ("*Notice*" or "*Program Access Order*," where appropriate), *appeals docketed sub nom. Cablevision Sys. Corp. v. FCC*, No. 07-1425 (D.C. Cir. filed Oct. 19, 2007), *Comcast Corp. v. FCC*, No. 07-1487 (D.C. Cir. filed Dec. 3, 2007).

competitive marketplace. Calls to expand regulations governing the sale of video programming should be firmly rejected.

I. INTRODUCTION AND SUMMARY.

In the *Program Access Order* accompanying the *Notice*, the Commission properly recognized that video programming and video distribution have grown increasingly more competitive since 2002, referring in particular to "(i) an increase in programming networks; (ii) a decrease in the percentage of popular national and regional networks that are affiliated with cable operators; and (iii) an increase in the market penetration of [multichannel video programming distributors ("MVPDs")] that compete with incumbent cable operators."[2] These conclusions were largely based on market conditions as of June 2005.[3] Of course, during the 29 months since then, these pro-competitive trends have continued to strengthen.[4]

Just a few weeks ago, the Commission found that "competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation" and that "almost all consumers are able to obtain programming through over-the-air broadcast television, a cable system, and at least two DBS providers."[5] Impartial observers agree that cable operators are facing intense competition. For example, Pali

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2 *Id.* ¶ 16.

3 *Id.* ¶ 16 & n.60 ("For the most part, the data noted herein comes from our 12th Annual Report on video competition, which reflects data on the video distribution and programming markets as of June 2005.").

4 *See* Comcast Comments, MB Dkt. No. 06-189 (Nov. 29, 2006); Comcast Reply Comments, MB Dkt. No. 06-189 (Dec. 29, 2006); Letter from James L. Casserly, Counsel to Comcast Corp., to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189 (Mar. 30, 2007) (highlighting certain significant video competition developments from December 29, 2006 through March 30, 2007); Comcast Comments, MB Dkt. No. 07-29 (Apr. 2, 2007); Comcast Reply Comments, MB Dkt. No. 07-29 (Apr. 16, 2007).

5 News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* at 1 (Nov. 27, 2007) ("*2006 Video Competition News Release*").

Capital analyst Richard Greenfield recently declared that cable is in "an all-out war" in the marketplace.[6] TheStreet.com recently reported that "[s]trong promotion of high-definition programming by satellite broadcasters DIRECTV and EchoStar [now DISH Network Corporation ("DISH Network")] along with the entry of phone companies like AT&T and Verizon in the video market has helped lure customers away from cable players like Comcast, Cablevision and now Time Warner Cable."[7]

The Direct Broadcast Satellite ("DBS") providers continued to report strong subscriber growth at the 2007 third quarter mark, with DIRECTV now serving 16.56 million subscribers, and DISH Network serving approximately 13.695 million subscribers.[8] The telcos also reported significant subscriber growth, with AT&T and Verizon together serving 843,000 video subscribers over their own facilities in addition to the millions more they have signed up for DBS service.[9]

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[6] Diane Mermigas, *Telcos to Cable: You Can Hear Me Now*, MediaPost.com, Nov. 12, 2007 ("'Investors are no longer trying to project whether the competition will have an impact; it is now exceedingly clear from third-quarter results and management body language that competition is negatively impacting the cable industry.'") (quoting Richard Greenfield), *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=70772.

[7] Scott Moritz, *Competition Pinches Time Warner Cable*, TheStreet.com, Nov. 7, 2007, *available at* http://www.thestreet.com/pf/newsanalysis/techtelecom/10388803.html; *see also* Shira Ovide, *Comcast Hit by Stiff Competition*, Wall St. J., Oct. 26, 2007, at C6.

[8] Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces Third Quarter 2007 Results* 3 (Nov. 7, 2007), *available at* http://media.corporate-ir.net/media_files/irol/12/127160/pdf/Q307Earnings.pdf; Press Release, EchoStar Communications Corp., *EchoStar Reports Third Quarter 2007 Financial Results* (Nov. 9, 2007), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=275179.

[9] Press Release, Verizon Communications Inc., *Verizon Reports Continued Success in 3Q 2007* (Oct. 29, 2007) (reporting 717,000 FiOS TV subscribers), *available at* http://investor.verizon.com/news/view.aspx?NewsID=863; Press Release, AT&T Inc., *AT&T Delivers Strong Third-Quarter Results; Growth Highlighted by Robust Wireless Gains, Advances in Enterprise Services, Accelerated TV Ramp* (Oct. 23, 2007) (reporting 126,000 U-verse TV subscribers), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24568.

The Commission reported these trends in the *Program Access Order*:

> Since the Commission last examined the exclusive contract prohibition in 2002, the percentage of MVPD subscribers receiving their video programming from a cable operator has declined from 78 percent to 67 percent, by some estimates. The number of cable subscribers has declined by 3.4 million since 2002, from 69 million to 65.4 million. During this same period, the percentage of MVPD subscribers receiving their video programming from a DBS operator has increased from 18 percent to over 30 percent, by some estimates. The number of DBS subscribers has increased by 11.6 million since 2002, from 18 million to 29.6 million, by some estimates. A significant development since 2002 is the emergence of video services offered by telephone companies, including AT&T, Qwest, and Verizon.[10]

In light of these marketplace facts, it is simply not possible that cable operators' market power has increased in the video marketplace.

In addition to the competition presented by these MVPDs, cable operators also face increased competition from video sources available on the Internet. "In July 2006, 107 million Americans, three out of every five Internet users, viewed video online [and] about 60 percent of U.S. Internet users downloaded videos."[11] A recent poll found that nearly 80% of adults are online,[12] and another poll found last summer that at least 57% of Internet users have streamed or downloaded video.[13] Vastly more online video content is being made available every day.[14] *The New York Times* reports:

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10 *Program Access Order* ¶¶ 23-24.

11 *2006 Video Competition News Release* at 4.

12 *See Poll Finds Nearly 80 Percent of U.S. Adults Go Online*, Reuters, Nov. 5, 2007, *available at* http://www.reuters.com/article/newsOne/idUSN0559828420071106.

13 *See* Press Release, Pew Internet & American Life Project, *Online Video Proliferates as Viewers Share What They Find Online; 57% of Online Adults Watch or Download Video* (July 25, 2007), *available at* http://www.pewinternet.org/PPF/r/142/press_release.asp.

14 *See, e.g.*, Mike Shields, *Oprah Signs Up for YouTube Channel*, Mediaweek.com, Nov. 5, 2007, *available at* http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003667424; Todd Spangler, *MOJO Inks Deal for Amazon Unbox*, Multichannel News, Nov. 13, 2007 (announcing the MOJO channel's deal to sell its

(footnote continued…)

> Why are fewer viewers watching the new fall television series? Perhaps because they are too busy watching video online. As broadband service becomes more available at home, the growing prevalence of video programming on the Internet is catching the attention of consumers -- not to mention marketers and media companies.[15]

In this intensely competitive environment, it is difficult to comprehend the Commission's decision to extend the current program access rules, let alone its proposals in the *Notice* to expand those rules. There is absolutely no factual evidence that further regulatory intrusions into network-distributor relationships are needed. As Comcast has explained, the evidence shows that MVPDs are obtaining access to the programming they need to compete.[16] The continuing subscriber growth reported by DBS providers and telcos cited above reinforces this evidence. Meanwhile, as Comcast explained in its program access comments filed last year, and as the Commission concluded in the *Program Access Order*, the program access provisions of the

(…footnote continued)

original programming through Amazon.com's Unbox digital video download service), *available at* http://www.multichannel.com/article/CA6500515.html; Chloe Albanesius, *NBC Direct Offers Limited Challenge to iTunes*, PCMag.com, Nov. 12, 2007 (reviewing the launch of NBC's beta product allowing users to download full episodes of NBC programming), *available at* http://www.pcmag.com/article2/0,2704,2215779,00.asp; Paul Farhi, *Net's Loss, Web's Gain: Viewers Have Growing Selection in Online Video*, Wash. Post, Nov. 8, 2007, at C1; John Eggerton, *PBS Signs Download Deals with BitTorrent, Vuze*, Broad. & Cable, Nov. 7, 2007 (noting that PBS has actively sought out downloadable platforms including YouTube and Unbox/Amazon because its audience "seems to like this kind of access"), *available at* http://www.broadcastingcable.com/article/CA6498393.html; Laura Martinez, *Telemundo To Stream Full-Length Fare*, Multichannel News, Nov. 6, 2007, *available at* http://www.multichannel.com/article/CA6497925.html; *Desperate Housewives on the Phone*, Economist.com, Nov. 2, 2007 (discussing the recent trend toward free downloadable programming for viewing on computers as well as mobile devices), *available at* http://www.economist.com/science/displaystory.cfm?story_id=10084899; Michael Malone, *Hearst-Argyle Launches More YouTube Channels*, Broad. & Cable, Nov. 1, 2007, *available at* http://www.broadcastingcable.com/article/CA6496681.html; Susan Kuchinskas, *Hulu: IPTV Like Advertisers Want It*, Internetnews.com, Oct. 29, 2007 (explaining how NBC and Fox's joint venture will permit users to download premium programming from the Internet), *available at* http://www.internetnews.com/bus-news/article.php/3707921; Glen Dickson, *Starz Gives Vongo a Makeover*, Broad. & Cable, Oct. 25, 2007, *available at* http://www.broadcastingcable.com/article/CA6494249.html; Todd Spangler, *NBCU To Sell TV Shows Through Amazon*, Multichannel News, Sept. 4, 2007, *available at* http://www.multichannel.com/article/CA6475135.html.

[15] Stuart Elliott, *Web Videos Stealing TV Viewers, and Marketers*, N.Y. Times, Nov. 16, 2007, at C6.

[16] *See* Comcast Reply Comments, MB Dkt. No. 07-29, at 17-22 (Apr. 16, 2007).

Communications Act do not give the Commission the requisite statutory authority to expand the program access rules to programming beyond what Congress intended.[17]

Given the growth of multichannel video competition and the crying need to focus agency and industry resources on a real need -- a successful broadcast digital transition -- protracting this program access proceeding is wasteful of the Commission's and the affected industries' time and attention. Other than shortening the term of the exclusive contract prohibition, a prohibition that should have sunset five years ago, the Commission should take no further action to revise its program access rules. In particular, the Commission should abandon its proposals to unlawfully stretch the program access rules to cover terrestrially-delivered and non-cable programming and to adopt a "standstill" provision.

II. THE COMMISSION DOES NOT HAVE AUTHORITY TO EXPAND THE PROGRAM ACCESS RULES TO REGULATE PROGRAMMING THAT CONGRESS DID NOT INTEND FOR THE LAW TO GOVERN.

A. The Commission Does Not Have Statutory Authority To Extend the Program Access Rules to Terrestrially-Delivered Programming.

The Commission and the courts have repeatedly addressed the issue of applying the exclusivity prohibition to terrestrially-delivered programming.[18] The Commission, *as recently as*

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[17] *See id.* at 29-32; *Program Access Order* ¶ 78; *see also Notice* ¶ 115.

[18] *See, e.g.*, *Program Access Order* ¶ 78; *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report & Order, 17 FCC Rcd. 12124 ¶ 73 (2002) ("*2002 Program Access Report & Order*"); *RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17093 (1999), *aff'd*, Memorandum Opinion & Order, 16 FCC Rcd. 12048 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000), *aff'd, EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002). Comcast has also addressed the issue on numerous occasions. *See, e.g.,* Comcast Reply Comments, MB Dkt. No. 07-29, at 29-31 (Apr. 16, 2007); Comcast Reply Comments, MB Dkt. No. 06-189, at 29-30 (Dec. 29, 2006).

three months ago, and the courts have consistently determined that Congress declined to give the Commission the authority to do so.[19] As the Commission explained,

> Commenters have failed to provide any new evidence or arguments that would lead us to reconsider our previous conclusion that terrestrially delivered programming is "outside of the direct coverage" of Section 628(c)(2)(D). We continue to believe that the plain language of the definitions of "satellite cable programming" and "satellite broadcast programming" as well as the legislative history of the 1992 Cable Act place terrestrially delivered programming beyond the scope of Section 628(c)(2)(D).[20]

Congress made a deliberate choice to exempt terrestrially-delivered cable-affiliated programming from the program access rules.[21] For the Commission to consider invoking *other* sources of authority to countermand Congress's specific decision shows enormous disrespect for Congress and its legislative judgments.[22] Moreover, to invoke a general grant of authority to

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[19] *See, e.g.*, *Program Access Order* ¶ 78; *Notice* ¶ 115. To the extent that certain parties will predictably assert that such an extension of the rules is necessary based on claims of satellite programming migrating to terrestrial delivery in order to evade the program access rules, such claims are baseless. These unsupported and vague allegations are made year after year. *See* Comcast Reply Comments, MB Dkt. No. 06-189, at 27 (Dec. 29, 2006) (describing comments making such allegations in the video competition proceeding); Comcast Reply Comments, MB Dkt. No. 05-255, at 25-26 (Oct. 11, 2005) (same). In the rare circumstances where parties have filed complaints alleging that networks were shifted to terrestrial delivery to evade the program access rules however, the Commission has consistently rejected the charges. *See, e.g., RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17093 (1999), *aff'd*, Memorandum Opinion & Order, 16 FCC Rcd. 12048 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000), *aff'd, EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002). There is more evidence of Sasquatch than there is of any such migration to evade the program access rules.

[20] *Program Access Order* ¶ 78; *see also Notice* ¶ 115.

[21] *See 2002 Program Access Report & Order* ¶ 73 (citing the legislative history of the program access provisions).

[22] *See Notice* ¶ 116 ("We seek comment regarding whether we have the authority to extend our program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in Section 628 that limits their scope to satellite programming.").

regulate where a specific statutory provision expressly forecloses such regulation would be directly contrary to settled principles of statutory construction.[23]

Nevertheless, the Commission seeks comment on "whether it would be appropriate to extend our program access rules to all terrestrially delivered cable-affiliated programming pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act."[24] These sections are wholly irrelevant, and none of them empowers the Commission to rewrite Section 628(c)(2)(D). The courts have determined

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[23] As the Supreme Court has stated, "It is an elementary tenet of statutory construction that [w]here there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one." *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) (internal citation omitted); *see Kepner v. United States*, 195 U.S. 100, 125 (1904) ("It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling."); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902); *see also Townsend v. Little*, 109 U.S. 504, 512 (1883) (noting that it is a "well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general").

The Commission itself has repeatedly acknowledged this basic tenet of statutory construction. *See, e.g., In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion & Order, 14 FCC Rcd. 14712 ¶ 553 (1999) ("[I]t is a commonplace of statutory construction that the specific governs the general. In interpreting this canon, the Supreme Court more recently has stated: '[t]his Court has understood the present canon (the specific governs the general) as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.'") (internal citations omitted); *In re Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York, Election of Open Video System Option and Motion for Extension of Time To Complete Open Video System Transition; Metropolitan Fiber Systems/McCourt, Inc., Election of Open Video System Option and Motion for Extension of Time To Complete Open Video System Transition*, Consolidated Order, 12 FCC Rcd. 3536 ¶ 23 (1997) ("[T]he United States Supreme Court has stated that the general rule of statutory construction is that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . . ") (internal citations omitted).

[24] *Notice* ¶ 116. Comcast does not accept the validity of the Commission's statement that "[a]s demonstrated by the examples of withholding of RSNs in San Diego and Philadelphia, . . . withholding of terrestrially delivered cable-affiliated programming is a significant concern that can adversely impact competition in the video distribution market." *Id.* This is now a matter of judicial review in a separate proceeding and will not be addressed further in this comment.

that Section 4(i) of the Communications Act[25] only provides the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the Communications Act, *not authority to adopt a new regulation that is contrary to another provision of the Act*.[26] Similarly, as the D.C. Circuit explained, Section 303(r)'s seemingly broad "public interest" clause is not a blank check to be used in the absence of a specific Congressional delegation of authority:

> The FCC cannot act in the "public interest" if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to "carry out the provisions of the Act," nor is it necessarily authorized by the Act. The FCC must act pursuant to *delegated authority* before any "public interest" inquiry is made under § 303(r).[27]

And Sections 201(b) and 303(r) cannot be cited as authority here because they are Title II and Title III provisions, which have nothing to do with services provided under Title VI.[28] Both the Commission and the courts have recognized that the Commission's rulemaking authority under Section 201(b) is limited to regulation of common carriers.[29] Section 303(r) is limited to regulation of *radio* communications.[30]

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25 47 U.S.C. §§ 154(i), 303(r).

26 *See American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (in lack of specific statutory authorization, the Commission's purported authority is "ancillary to nothing"); *see also California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities.") (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (explaining that the Commission's authority under Title I "is restricted to that reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting")).

27 *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original).

28 *See* 47 U.S.C. §§ 201(b), 303(r).

29 *See In re The 2002 Biennial Regulatory Review*, Report, 18 FCC Rcd. 4726 ¶ 18 n.31 (2003) ("Section 201(b) is a 1938 amendment to the Communications Act of 1934 which establishes the Commission's basic rulemaking authority *over services and charges of communications common carriers*[.]" (emphasis added)); *see also GTE Servs. Corp. v. FCC*, 474 F.2d 724, 734 n.15 (2d Cir. 1973) (emphasizing that jurisdictional grant under

(footnote continued…)

Nor do the Title VI provisions the Commission cites provide it the authority it seeks. Section 601(6) is a statement of the purposes of the 1984 Cable Act;[31] it does not grant the Commission *any* authority.[32] Section 612(g) is also unavailing.[33] As an initial matter, the marketplace facts that would need to be demonstrated before the Commission could exercise authority under Section 612(g) do not exist.[34] Moreover, as NCTA recently explained:

> Section 612(g) was intended solely to authorize the Commission to regulate the rates, terms and conditions of <u>leased access</u> more extensively, and to impose additional procedures for resolving leased access disputes, if the 70 percent benchmarks were met -- and if such changes were necessary to provide greater diversity of information sources . . . . The legislative history could not be clearer: The 70/70 test relates *only* to leased access. Not to cable ownership, not to program access, not to rate regulation, not to wholesale or retail bundling or packaging of cable programming – not to anything else.[35]

(…footnote continued)

Section 201(b) is limited to common carrier communication services). The Supreme Court's decision in *Iowa Utilities* is not to the contrary. The issue in *Iowa Utilities* was whether the Commission had the authority to enforce the local telephone competition provisions of the 1996 Act; the Court's statements regarding the Commission's authority under Section 201(b) were clearly made in that context and cannot reasonably be construed as applying beyond Title II of the Act. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

30 Title III of the Communications Act is entitled "Special Provisions Relating to Radio." Section 303(r) of Title III gives the Commission authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." 47 U.S.C. § 303(r). Radio waves are not necessarily used for terrestrial delivery of programming networks. Of the few networks that are delivered terrestrially to MVPDs, the majority are delivered over fiber optic lines.

31 *See* 47 U.S.C. § 521(6).

32 *Id*. (explaining that one of the purposes of Title VI is to "promote competition in cable communications *and minimize unnecessary regulation that would impose an undue economic burden on cable systems*") (emphasis added). Overturning every rock in sight to try to uncover some plausible jurisdictional authority, the Commission chooses not to see those portions of the statute "hiding" in plain sight that speak directly to Congress's intent. *See Notice* ¶ 116 & n.516 (omitting the italicized language).

33 *See* 47 U.S.C. § 532(g).

34 *See 2006 Video Competition News Release*.

35 Letter from Kyle McSlarrow, President and CEO, NCTA, to the Chairman and Commissioners, FCC, MB Dkt. No. 06-189, at 4 (Nov. 14, 2007) (emphasis in original); *id.* ("At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have

(footnote continued…)

Similarly, Section 616(a) is a program *carriage* provision that specifies certain regulations governing *carriage* agreements that Congress ordered the Commission to adopt -- it does not provide the Commission authority that would contravene a specific program *access* provision.[36]

Section 628(b), although it is a program access provision, may not be invoked to generally extend the program access rules to terrestrially delivered cable-affiliated programming.[37] As the Commission has previously explained,

> In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered. . . . Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. . . . Section 628(b) remains, as the Commission has stated previously, "a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming." *It cannot, however, be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate.*[38]

Even more recently, the Media Bureau clarified that,

> Section 628(b) may not, without more, be invoked against conduct that is lawful under another provision of the Communications Act. The Commission has stated that although

(…footnote continued)

availability to them, the FCC is granted authority to promulgate any additional rules necessary to ensure that <u>leased access channels</u> provide as wide as possible a diversity of information sources to the public.") (citing H.R. Rep. No. 98-934, at 54 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4691) (emphasis in original). In any event, the 70/70 Test has not been met.

[36] *See* 47 U.S.C. § 536(a).

[37] *See* 47 U.S.C. § 548(b).

[38] *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 ¶¶ 32-33 (1998), *aff'd*, Memorandum Opinion & Order, 15 FCC Rcd. 22802 (2000) (emphasis added) (internal citations omitted).

> Section 628(b) broadly prohibits cable operators from engaging in "unfair methods of competition," this section of the Act "cannot be read in isolation."[39]

Thus, because terrestrially-delivered programming is clearly outside the scope of the exclusivity provision of Section 628(c), the Commission cannot use Section 628(b) to fashion a new exclusivity provision that applies to terrestrially-delivered programming.[40]

Finally, the notion of invoking Section 706 of the Telecommunications Act[41] is particularly misguided given the agency's prior recognition that Section 706 is the source of no authority whatsoever and given the lack of even a tenuous connection between the proposal here and the availability of advanced telecommunication capabilities.[42] There *is* a "Section 706" that provides far more relevant guidance here, but it appears in the *Administrative Procedure Act* and directs reviewing courts to invalidate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43]

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[39] *Everest Midwest Licensee, L.L.C v. Kansas City Cable Partners and Metro Sports*, 18 FCC Rcd. 26679 ¶ 10 (Media Bureau 2003) (internal citations omitted).

[40] Even Section 628(b) maintains the distinction between satellite and terrestrial delivery of programming. *See* 47 U.S.C. § 548(b).

[41] *See Notice* ¶ 116.

[42] The Commission has previously made clear that Section 706(a), Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 nt.), which "encourage[s] the provision of new technologies and services to the public," does not constitute an independent grant of authority to regulate. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011 ¶ 69 (1998) ("After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."). The Commission concluded that Section 706(a) merely "directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services." *Id*.

[43] 5 U.S.C. § 706(2)(A).

In sum, the Commission has no authority to extend the program access rules to programming that is terrestrially delivered and any decision to do so would not withstand judicial review.

B. There Is No Basis To Expand the Exclusive Contract Prohibition to Non-Cable-Affiliated Programming.

The fact that the Commission would even raise the possibility of expanding the exclusive contract prohibition to non-cable-affiliated programming unintentionally highlights the flaws in the Commission's decision to retain the exclusive contract prohibition for vertically integrated programming.[44] Whether it is valuable to a given MVPD to have access to certain programming does not turn on whether the supplier of that programming is affiliated with a cable operator. There is surely cable-affiliated programming that is not "must-have" by any definition of the phrase, and there is also extremely popular programming that is affiliated with *non*-cable MVPDs -- or that is not affiliated with *any* MVPD. This is a key reason why the Commission's decision to perpetuate the exclusivity prohibition should not survive judicial review, even if one believes that the availability of certain programming is "necessary to preserve and protect competition and diversity in the distribution of video programming."[45] Any rule that applies solely to cable-affiliated programming is both over- and under-inclusive.

But the remedy for these anomalies is to let the exclusivity prohibition sunset, as Congress intended, not to extend it to programming that is affiliated with non-cable MVPDs. For the same reasons discussed in the previous section of these comments, the Commission does

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44 *See Notice* ¶ 118.

45 47 U.S.C. § 548(c)(5).

not have the authority to apply program access rules to non-cable affiliated programming.[46] Only Congress can rewrite the law.

III. THE COMMISSION SHOULD SHORTEN THE TERM OF THE EXTENSION OF THE EXCLUSIVE CONTRACT PROHIBITION.

If the *Program Access Order* is upheld on appeal, Comcast would welcome the Commission's recognition that a five-year extension of the exclusive contract prohibition may be too long and that increases in competition should lead to reductions in regulation.[47] There is no need for the Commission to reinvent the wheel for this purpose, when Congress has already given it standards for determining when "effective competition" should be deemed to exist in a given market.[48] Those standards require that the Commission find that effective competition exists whenever competing providers make their services available to half of the households in a given franchise area and have obtained, in the aggregate, a 15% level of subscribership (the "50/15 Test") or whenever a telephone company is providing multichannel video service in a market.[49] Those standards can be applied on a DMA-wide or larger geographic basis for purposes of the exclusivity prohibition, even as they continue to be applied at a franchise level for rate regulation purposes. There is no basis for rewriting the statutory test to require that "new entrant MVPDs" reach a certain level of service availability or actual subscribership.[50] In fact, Congress believed the resources of the telcos were so certain to ensure effective competition that

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46 *See* discussion, *supra* Section II.A.

47 *See Notice* ¶ 114.

48 *See* 47 U.S.C. § 543(*l*).

49 *See* 47 U.S.C. § 543(*l*)(1)(B), (D).

50 *See Notice* ¶ 114.

it instructed the Commission to find that effective competition exists whenever an incumbent local exchange carrier is providing video services in a market, even when the 50/15 Test is not satisfied.[51]

Whatever test the Commission may choose, it will be meaningless unless the Commission acts in a timely fashion. Prompt rulings are essential. As Chairman Martin has rightfully said in a different setting, "parties have a right to a timely decision on their applications."[52] That statement should apply to effective competition petitions as well. Yet petitions for determinations of effective competition for purposes of rate deregulation routinely languish without Commission action for years.[53] Such inaction flouts the intentions of Congress, subverting the mechanism established to ensure that regulation would diminish as competition increased.

If the *Program Access Order* is upheld, the Commission should apply the pre-existing standards of the effective competition test to shorten the term of the prohibition in a particular

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51 *See* 47 U.S.C. § 543(*l*)(1)(D).

52 *In re Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 19861, 19910 (2001) (Statement of Kevin J. Martin, Commissioner) ("I commend the Chairman . . . for reducing the backlog of pending radio licenses transfer applications considerably since he assumed his position in January. I am troubled, however, by the number of applications that remain pending before the Commission. I am even more concerned by the length of time that some of these applications have been pending -- at times, for several years. I believe that the parties have a right to a timely decision on their applications, and I regret that the Commission at times has not acted in a more responsible fashion.").

53 Certain effective competition petitions filed by Comcast have been pending for over four and a half years, *even though they are unopposed*. *See generally* Public Notice, FCC, *Special Relief and Show Cause Petitions*, Report No. 0073 (Apr. 28, 2003) (including effective competition petitions filed on April 11, 2003 for Framingham, MA, CSR-6154-E; Wakefield, MA, CSR-6153-E; Brookline, MA, CSR-6152-E; and Burlington, Natick, Waltham, and Watertown, MA, CSR-6156-E).

DMA or larger geographic area. The establishment of any test for this purpose, however, will be meaningful only if the Commission promptly rules on effective competition petitions.

IV. THE COMMISSION SHOULD NOT ADOPT A STANDSTILL PROVISION FOR PROGRAM ACCESS COMPLAINTS.

The *Notice* asks many questions about the process that should govern stay orders, including standstill provisions.[54] Notably, the Commission omits the basic question of whether it has the necessary authority to take such action. As NCTA aptly explained, such an "extraordinary upending of the right to contract -- and of the ability of complainants to establish unilateral government takeover of distribution arrangements *pendente lite* -- is not found in Section 628 or any other U.S. law. The Commission lacks statutory authority to impose this type of remedy, based on a mere allegation of a rule violation."[55] Congress clearly knows how to write a statute creating a standstill requirement,[56] but it chose not to do so in the program access provisions.

Even if the Commission has the requisite authority to issue a standstill provision, it should decline to adopt such a provision. As noted in Comcast's program access reply comments filed last year, a standstill provision would severely undermine resolution of program access disputes and encourage more MVPDs to use complaint procedures as negotiating leverage.[57] Moreover, a standstill provision would interfere with programmers' ability to protect

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54 *See Notice* ¶ 137.

55 NCTA Reply Comments, MB Dkt. No. 07-29, at 14 (Apr. 16, 2007).

56 *See, e.g.,* 47 U.S.C. § 534(b)(9) (providing that "[n]o deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations").

57 *See* Comcast Reply Comments, MB Dkt. No. 07-29, at 38-39 (Apr. 16, 2007).

themselves from the unauthorized carriage of their programming. Parties are not entitled to a remedy before a violation has been proved. If a contract expires, it expires, just the same as a retransmission consent agreement that has expired.[58] Thus, the Commission should not adopt a standstill provision for program access disputes.

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[58] Last year, the Commission refused to mandate continued carriage of programming while retransmission consent negotiations between Sinclair Broadcasting and Mediacom were ongoing. *See In re Mediacom Communications Corp. v. Sinclair Broad. Group, Inc., Emergency Retransmission Consent Complaint for Enforcement for Failure To Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion & Order, 22 FCC Rcd. 47 ¶ 25 (2007) ("[W]e recognize the cost to consumers if Mediacom and Sinclair do not reach an agreement . . . . Although we would not have authority to order continued carriage in this case, we would encourage the parties to do so."). The Commission stood firm even though allowing Sinclair to pull its signal from Mediacom resulted in more than 700,000 Mediacom subscribers not being able to watch their "must have" local broadcast programming and many also missed the Super Bowl. *See* Ted Hearn & Linda Moss, *FCC Sits Out Sinclair Flap*, Multichannel News, Feb. 5, 2007, *available at* http://www.multichannel.com/article/CA6413215.html.

V. CONCLUSION

For the reasons set forth above, the Commission should decline to expand the scope of its program access rules or to adopt new procedures to govern the program access complaint process. Instead, the Commission should allow video programming distributors and the Commission itself to concentrate their energies on ensuring a successful transition to digital television.

Respectfully submitted,

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